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No. 75-1248

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY B. CATALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On May 18, 1973, petitioner, an attorney, was adjudicated in criminal contempt during an income tax refund suit brought by him in his own behalf in the United States District Court for the Southern District of New York. The court fined him $50 (Pet. App. A). Although petitioner appealed from the adverse decision of the district court in his income tax case, he did not file a notice of appeal from the contempt judgment, as required by Rule 4(b), Federal Rules of Appellate Procedure. Accordingly, on June 25, 1974, the court of appeals held that it lacked jurisdiction to review the judgment of contempt (Pet. App. B). Petitioner did not file a petition for a writ of certiorari, but, instead, on October 1, 1974, moved the district court for a remittur of the fine, which was denied by order dated October 16, 1974 (Pet.

App. C). The court of appeals affirmed on April 17, 1975 (Pet. App. D), and no petition for a writ of certiorari was filed from this judgment.

Some time after April 17, 1975, petitioner filed a notice of appeal from the district court's original order of May 18, 1973, adjudging him in contempt (Pet. App. E 55). On September 30, 1975, the court of appeals dismissed that appeal on the ground that it was not timely because it was filed almost two years after the district court's judgment. Alternatively, the court, after reviewing the merits, found "no sufficient reason to disturb the [district court's] judgment" (Pet. App. E 55).

The court of appeals denied rehearing on January 6, 1976 (Pet. App. G). The petition for a writ of certiorari, seeking review of the dismissal of an appeal from a judgment of criminal contempt, was not filed until March 3, 1976, and is, therefore, out of time under Rule 22(2) of the Rules of this Court.

At all events, the court of appeals correctly dismissed petitioner's appeal because the notice of appeal was filed approximately two years after the district court's contempt adjudication and, therefore, was not timely. See *United States* v. *Robinson,* 361 U.S. 220; *Berman* v. *United States,* 378 U.S. 530. Nor is there any merit to petitioner's suggestion (Pet. 37) that he was misled by the district court's procedure. Petitioner is an attorney and was surely aware that the district court had held him in contempt. Moreover, since petitioner's conviction has been reconsidered by the district court and reviewed by the court of appeals, there is no reason for further review by this Court. See *Kann* v. *United States,* 323 U.S. 88, 93; *Goldman* v. *United States,* 316 U.S. 129, 135.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.